No. 84-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SHARON M. BARGER, MARGARET DIANE BRANDES and VALERIE MARIA GILBERT,
Petitioners,

v.

PLAYBOY ENTERPRISES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether there is a constitutional right to reputation that the states must protect by the adoption of a uniform rule regarding the substantive law of group libel.

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Respondent Playboy Enterprises, Inc. respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Ninth Circuit's unpublished opinion in this case.

INTRODUCTION

Petitioners brought this diversity action for defamation in connection with an article published in the July, 1981 issue of Playboy Magazine, entitled "Undercover Angel." The allegedly defamatory matter in the article did not identify or refer to petitioners specifically but simply referred to a group in which petitioners claim membership, i.e., the "brides" of the Hell's Angels Motorcycle Club.

Petitioners' Second Amended Complaint alleged that, although the article referred only to a group, readers understood it as referring personally to petitioners. The Complaint further stated that the group of "Hell's Angels' brides" consisted of at least 125 persons. Petitioners alleged nonetheless that the purportedly defamatory matter was "of and concerning" them.

The District Court dismissed the complaint, applying California law: "Where the group is large—in general, any group numbering over 25 members—the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them,' [citations]." Appendix "A" to Petition for Writ of Certiorari (the "Petition") at 4.

In an unpublished per curiam decision, the Ninth Circuit Court of Appeals affirmed the dismissal, relying on the same California rule of law: "The publication must defame an ascertainable person and apply with certainty to the plaintiff. . . . Where a large group is libeled, individual members of that group do not have a cause of action based merely on membership." Appendix "B" to Petition at 2.

THE WRIT SHOULD BE DENIED

I. The Petition Does Not Raise Any Issues Of Constitutional Dimension, But Merely Seeks To Change A Common Law Rule Adopted By California.

The sole question that petitioners present to this Court is

> . . . whether the Group Libel Rule denied Petitioners their constitutional rights by arbitrarily denying them the right to recover damages . . . solely because petitioners were members of a 'large' group including more than 25 persons. Petition at i.

Petitioners assume in their question, but do not—and cannot—demonstrate in their Petition, that there exists any constitutional right to a cause of action for defamation.[1] Petitioners assert that this "right" to reputation finds its source in the 9th, 10th and 14th Amendments to the Constitution: "[T]he several states are required to protect the competing constitutional nterests involved in the protection of the individual's reputation." Petition at 2-3, 16-17 n.4.

Contrary to petitioners' unfounded assertions, this Court has plainly held that there is no constitutional right to reputation. In *Paul* v. *Davis*, 424 U.S. 645 (1976), this Court rejected any notion that the interest in reputation asserted in a libel action is either property or liberty protected by the Fourteenth Amendment, or is otherwise constitutionally protected. *Id.* at 712. Accordingly,

> [The] interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even whereas here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest and reputation asserted in this case is neither "liberty" nor "property" guaranteed against State deprivation without due process of law. *Id.* at 712.

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[1] Indeed, petitioners go so far as to argue that the Constitution mandates that the states must uniformly implement this heretofore unrecognized constitutional "right". Petition at 30-38. This issue is discussed in Section II, *infra*.

Two years earlier, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court explained that because libel law is chiefly a creature of state law, the states have wide latitude in developing legal principles to protect the interest in reputation. The only limitation on the states' power to enforce the law of libel is, of course, that imposed by the First Amendment. *Id.* at 341-46. Thus, "[T]he protection of private personality, like the protection of life itself, is left primarily to the individual states under the 9th and 10th Amendments." *Id.* at 341.

Because there exists no constitutional right to the protection of reputation, the state of California has substantial latitude in providing and implementing a remedy for those defamed. Petitioners do not claim that the District Court or the Court of Appeals incorrectly applied California law as interpreted by the highest court of that state. What petitioners do claim is that the "Group Libel Rule" is "arbitrary" and "is not justified by any rational public policy considerations." Petition at 20, 23. It follows that the only question truly raised by the Petition is whether the rules California has adopted for the protection of the reputation of its citizens is a wise one. Absent some constitutional limitation, however, the wisdom of a state law is not a matter with which this Court is concerned. The Petition should be denied.

II. There Is No Conflict Among The Circuits Regarding The Group Libel Rule.

Petitioners suggest that the Petition should be granted in order "to secure uniformity of decision in this important area of constitutional law. . . ." Petition at 30-34. A reading of this portion of the Petition reveals, however, that there is simply a conflict among state courts in determining which group libel doctrine to adopt.

As this Court stated in *Ruhlin* v. *New York Life Insurance Company*, 304 U.S. 202 (1938), "as to questions controlled by state law . . . , conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Id.* at 206. That Oklahoma and New York have adopted group libel rules more to petitioners' liking than the rule in California, is not a basis for this Court to exercise its jurisdiction.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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